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Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION, *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondents*

(The Collateral Proceeding)

FEDERAL POWER COMMISSION, *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondents*

(The Curtailment Proceeding)

No. 71-1040

UNITED GAS PIPE LINE CO. and PENNZOIL UNITED, INC., *Petitioners*

v.

LOUISIANA POWER & LIGHT CO., *Respondent*

UNITED GAS PIPE LINE CO., *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL., *Respondents*

(FPC Opinion 606)

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Preliminary Statement

Shell Oil Company, a party intervenor before the United States Court of Appeals for the Fifth Circuit in the so-

called "curtailment proceeding",[1] opposes the Petitions for Writs of Certiorari filed herein by the Solicitor General on behalf of the Federal Power Commission and by United Gas Pipe Line Company and Pennzoil United, Inc. The issuance of writs of certiorari herein, on issues not yet ripe for review by this Court, will raise serious constitutional questions which need not be raised if the normal and statutorily-provided courses of administrative action and judicial review are allowed to proceed.

Each of the petitions seeks review of the decision of the Fifth Circuit in Case No. 71-2550, *Louisiana Power & Light Co. v. United Gas Pipe Line Company, et al.* (Appendix A, Solicitor General's petition, page 1a) herein referred to as "the injunction case". In addition, petitioners seek review of Federal Power Commission Opinions Nos. 606 and 606-A entered in Docket Nos. RP71-29, *et al.*, *United Gas Pipe Line Company* (Appendices E and F, Solicitor General's petition, pages 48a through 84a). These Commission opinions, which are now pending on applications for review in the Fifth Circuit, are herein referred to as "the curtailment case".

Statement of the Case

Shell adopts the statement of the case in the Solicitor General's petition, with one addition. The Fifth Circuit's

1. The lead case in the Fifth Circuit seeking review of the Federal Power Commission's Opinions Nos. 606 and 606-A is *Louisiana Power & Light Co.* and *New Orleans Public Service, Inc. v. Federal Power Commission*, Case No. 71-3429. Shell Oil Company was also a party to the Commission's proceeding in which Opinions Nos. 606 and 606-A were entered (F.P.C. Dockets Nos. RP71-29, *et al.*). None of the decisions of which review is sought herein have been published. They are, however, reproduced in full in the Appendices to the petitions filed herein. Reference will be made thereto as required.

decision in the injunction case held that the Federal Power Commission lacked jurisdiction over United's "Green System"[2] from which deliveries were being made to one of the LP&L facilities. On February 9, 1972, the Commission issued its Opinion No. 610[3] holding to the contrary. Applications for rehearing of this Opinion may be filed with the Commission at any time prior to March 10, 1972.[4]

Jurisdiction to Review Opinion No. 606 Prior to the Court of Appeals Review

The Solicitor General's petition (page 21) refers to the uncertainty of this Court's power to issue a writ of certiorari where the decision to be reviewed has been entered by an administrative agency and no decision thereon has been entered by any court. Review by writ of certiorari before rendition of judgment is provided in 28 U.S.C. § 1254(1), and Rule 20 of the Rules of the Supreme Court provide for a writ of certiorari to review a case pending in a court of appeals "before judgment is given in such court". In the body of this Rule, reference is made to seven cases,[5] but in all seven, judgments or orders had

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2. The "Green System" is United's pipeline system in the New Orleans area which has traditionally been operated as a separate intrastate system.

3. FPC Docket No. CP71-89, *United Gas Pipe Line Company* (Appendix F, United-Pennzoil petition, page 91a).

4. Section 19a of the Natural Gas Act (Appendix A hereto), 52 Stat. 821, 56 Stat. 84, 15 U.S.C. § 717r.

5. *United States v. Bankers Trust Co.*, 294 U.S. 240; *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330; *Rickert Rice Mills v. Fontenot*, 297 U.S. 110; *Carter v. Carter Coal Co.*, 298 U.S. 238; *Ex parte Quirin*, 317 U.S. 1; *United States v. United Mine Workers*, 330 U.S. 258; *Youngstown Co. v. Sawyer*, 343 U.S. 579.

been entered in some court prior to issuance of the writ of certiorari. The Solicitor General cites *Marbury v. Madison*, 1 Cranch 137, 175, and asks comparison to *Wheeler Lumber, Bridge & Supply Co. v. United States*, 281 U.S. 572, 576. The language quoted from *Marbury v. Madison* points to the essential criterion of appellate jurisdiction, but was not offered as a complete definition thereof. The context is revealed by the Court in the same paragraph, where it distinguishes between directing a mandamus to a court and issuing it directly to a public officer.[6]

Perhaps more useful here is the discussion in the *Wheeler Lumber* case. Although it was actually before the Supreme Court on a certified question (28 U.S.C. §1254 (3)), the arguable breadth of the question prompted the Court to state:

> "There are two reasons why a certification by that court which embraces the whole case cannot be entertained by this court. One is that to accept such a certification and proceed to a determination thereon, in advance of a decision by that court, would be an exercise of original jurisdiction by this court, contrary to the constitutional provision which prescribes that its jurisdiction shall be appellate in all cases other than those affecting ambassadors, other public ministers and consuls, and those in which a state shall be

6. "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction." (1 Cranch at 175-176)

a party. Art. III, § 2, cl. 2. The other is that the statute permits a certification only of 'definite and distinct questions of law.' " (281 U.S. at 576.)

In the *Wheeler Lumber* case, the certified question had been submitted by the United States Court of Claims where the suit had been brought following a tax refund application denial by the Commissioner of Internal Revenue.

In another certified question case decided by this Court, *United States v. Rice*, 327 U.S. 742, the issue was discussed but not decided, concerning the Court's power to decide a case or controversy not within its original jurisdiction and not previously decided by an inferior court. It may be noted in this case, however, that the Court apparently assumes that its appellate jurisdiction is limited to cases decided by inferior courts.

Reference is made to this Court's decision in *Postum Cereal Company, v. California Fig Nut Company*, 272 U.S. 693, a trademark case in which a Patent Office examiner's holding for Postum had been appealed to and affirmed by the Commissioner of Patents. An appeal from the Commissioner's decision had been dismissed by the Court of Appeals of the District of Columbia. Because the nature of the disposal was an administrative decision rather than a judicial judgment, this Court found it had no appellate jurisdiction.

Section 19(b) of the Natural Gas Act provides for review of Federal Power Commission orders by United

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2. "It may be doubted whether the statute contemplates our going beyond the certified question to decide a case or controversy not within our original jurisdiction, and which, save for the inferior court has decided it, could not be brought here by appeal." (34? U.S. at 747, Emphasis supplied.)

States Courts of Appeal and provides for the finality of such reviewing court's judgment, "subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Sections 346 and 347 of Title 28". The Supreme Court review contemplated by Section 19(b) is clearly of the court of appeals judgment, not of the administrative agency's order.

The Curtailment Issue

The first question presented in each of the petitions is whether the Natural Gas Act gives the Federal Power Commission jurisdiction to curtail deliveries of natural gas from interstate pipelines to direct industrial customers. This issue arises in the context of natural gas supply shortages of imposing proportions. As a major independent producer of natural gas, Shell is acutely aware of this problem and supports and encourages those efforts by the Federal Power Commission and by the state regulatory bodies which are aimed at reversing the downward trend in the gas supply picture by encouraging increased levels of exploration and development.

In the curtailment case before the Federal Power Commission, Shell did not oppose Commission jurisdiction to curtail direct industrial purchases from interstate pipelines, and we do not propose any such opposition in the review of that case before the Fifth Circuit (if that be where such review is to be conducted). Nor do we offer any such opposition with regard to the review herein of that basic question. The issues relating to this question were well defined by other parties, not only in the curtailment proceeding before the Commission but also in the injunction proceeding before the Fifth Circuit.

Each of the petitioners has pointed to the national importance of this Court determining the curtailment issue. We cannot dispute the importance of the question, and we will not impose further argument to that already presented. Shell's position concerning Opinion No. 606 (the curtailment case) however, does challenge two other aspects of the Commission's holding therein. One is the provision in the Commission decision that would absolve United of all responsibility for damages resulting from the breach of its contract obligations concerning impaired deliveries regardless of United's own acts or omissions which might be proven as the root cause of the impairment situation. This issue is one which Shell will raise on review of Opinion No. 606. It is not an issue of such urgent national concern that it justifies bypassing the Fifth Circuit's review. This particular issue is not presented by the Fifth Circuit decision in the injunction proceeding.

Also present in the curtailment case are issues relating to United's curtailment categories (by types of sale and end use), the levels from which curtailments will be made under United's tariff, and whether a tariff filing is the proper means under the Natural Gas Act of implementing a curtailment program. Other issues, including environmental impact have been referred to the Presiding Examiner for further findings. None of the issues, other than the basic question of Commission curtailment power over direct industrial purchases, is of imperative national urgency, and none is ripe for review herein.

If this Court should grant certiorari to review the Fifth Circuit's injunction decision, it would be consistent with sound judicial administration to decide only the basic issue of Commission jurisdiction to curtail direct industrial

purchases from interstate pipelines. If the Fifth Circuit were affirmed on this point, there would be no change in the present position of the parties. If reversed, the injunction case would be remanded to the Fifth Circuit, which is where the other curtailment issues are being considered on review of the Commission's Opinion No. 606. In either event, the basic question presented by both petitioners is answered, and without bypassing the Fifth Circuit's review of Opinion No. 606.

The other aspect of Commission Opinion No. 606 challenged by Shell relates to the application of United's curtailment to sales made from its intrastate system in the New Orleans area (the "Green System-East"). Because this issue is so inextricably bound to the primary jurisdiction question, the second question presented in each of the petitions herein, it should be discussed in that context.

The Primary Jurisdiction Issue

One of the issues presented in the injunction case was whether United's Green System was subject to Federal Power Commission jurisdiction. The Fifth Circuit held that it was not, inasmuch as it was intrastate in character and commited to Louisiana jurisdiction. Both petitions assign error to the Fifth Circuit for deciding this issue prior to the Commission's determination of jurisdiction over United's Green System.

On February 9, 1972, after the filing of the Solicitor General's motion and petitions, but prior to the filing of the United-Pennzoil petition, the Federal Power Commission issued its Opinion No. 610 in Docket No. CP71-89,

United Gas Pipe Line Company (Appendix F, United-Pennzoil petition, page 91a). In that proceeding several parties, including Shell, had contended that United's "Green-System-East" (the totally uncertificated intrastate system in the New Orleans area) was not subject to Commission jurisdiction. Federal Power Commission Opinion No. 610 held otherwise.

As posed in the Solicitor General's petition, this question is not strictly one of Federal Court jurisdiction but rather whether the Fifth Circuit should have deferred ruling on the "Green-System-East" issue until after the Commission had decided United's certificate case (Docket CP71-89). From the standpoint of Louisiana Power & Light Company (LP&L), such a deferral could destroy the value of the injunctive relief it sought. At the time of the Fifth Circuit decision, more than six (6) months had already passed since the record was closed in Docket CP71-89. Even now the administrative process is incomplete, inasmuch as applications for rehearing of Commission Order No. 610 may be filed any time prior to March 10, 1972, with Commission action thereon to follow. Several questions relating to certification have been remanded to the Examiner for further hearings.

Neither of the petitions asks for review on the merits of the Fifth Circuit's holding on the intrastate character of the Green System. We agree. The Fifth Circuit's decision on this issue was based on a record almost identical to that developed in the Commission hearing in Docket CP71-89. By its active intervention in the injunction case, the Commission participated fully in the development of that record. As pointed out by the Court of Appeals with regard to the Green System issue:

"There is no dispute in the record as to any fact bearing on this point." (Appendix A, Solicitor General's petition, page 22a)

In the certificate proceeding before the Federal Power Commission (Docket No. CP71-89), United and the Commission Staff relied principally on the Fifth Circuit's decision in the *Florida Parishes* case,[8] and Commission Opinion No. 610 did likewise. The same court that decided the *Florida Parishes* case, distinguished that case in its opinion in the *LP&L* injunction decision, and there is no more reason for this Court to review this issue on the merits now than there was when certiorari was denied in *Florida Parishes.*

It would be most unlikely that a decision by this Court would precede the Commission's action on rehearing of its Opinion No. 610, and following such action, that Opinion would be engaged in the process of judicial review on the merits. The question on the merits was decided by the Fifth Circuit on the basis of undisputed physical facts relating to the channel of constant flow. There is nothing to indicate that the applicable legal criteria have changed or will change upon review of Opinion No. 610. Unless additional evidence is developed on rehearing before the Commission, the same undisputed physical facts will also be controlling. Certiorari on the primary jurisdiction question, while raising some interesting legal points, would not work toward resolution of the issue on the merits.

The Fifth Circuit's Opinion refers to a leading text in the administrative law field, K. C. Davis, *Administrative*

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8. *Louisiana Public Service Commission v. F.P.C.*, 359 F.2d. 525 (5th Cir. 1966), *cert. den.* 385 U.S. 833.

Law Treatise, concerning whether administrative jurisdiction may be challenged in advance of exhaustion of administrative remedies. This treatment of the subject matter has a most pointed relevance to the instant case as it states:

> "When irreparable injury will result from the administrative proceeding and the lack of jurisdiction clearly appears from considerations which are not within the agency's specialized understanding, imposing the exhaustion requirement would be both unjust and unfair." (3 K.C. Davis, Administrative Law Treatise, § 20.03, Ch. 20, page 68)

The Fifth Circuit has remanded the injunction case for further fact development on the issue of irreparable injury. Concerning the clear lack of administrative jurisdiction, that clarity was found by the same court which decided the *Florida Parishes* case[9] on which the proponents of jurisdiction principally relied. As to the essential considerations on which the jurisdictional determination was based, all of these were uncontradicted facts fully developed for the Court. There was no area of specialized agency understanding with any bearing whatsoever on this determination. Certiorari should not be granted on the primary jurisdiction issue.

Conclusion

The Petitions for Writs of Certiorari in the curtailment proceeding should be denied. The normal appellate processes will better serve the public interest, as well as the interest of sound judicial administration, in view of the number and complexity of the issues presented and in

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9. *Louisiana Public Service Commission v. F.P.C.*, *supra*.

view of the lack of national urgency as to all except the basic issue. The review of Commission Opinion No. 606 should proceed in the Fifth Circuit. To short circuit that review will raise questions of this Court's jurisdiction which need not be raised if normal judicial processes are allowed to continue. The only issue in that case for which justification of immediate settlement is offered by the petitioners is the basic question of Commission jurisdiction to curtail direct industrial purchases from interstate pipelines. This issue is also squarely presented in the injunction case and, if considered there, would not involve any deviation from the statutory appellate processes. If certiorari is granted in the injunction case, it should be limited to the question of Commission jurisdiction to curtail direct industrial purchases from interstate pipelines. This issue was the first question presented in each of the petitions herein. On no other issue should certiorari be granted.

Respectfully submitted,

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Appendix A

Natural Gas Act, Section 19

Section 19:

Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the

natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commisison upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered; as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be con-

clusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 21, 1938, c. 556, § 19, 52 Stat. 831; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 19, 72 Stat. 947; 15 U.S.C. § 717r.